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Supreme Court, U. S.
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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1947

SCHINE CHAIN THEATRES, INC., ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES FOR CLARIFICATION

In the Court of Claims of the United States

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The purpose of this petition is to call attention to a matter presented to this Court for decision which was apparently not dealt with in its opinion.

The opinion set aside the divestiture provisions of the decree "so that the district court can make the findings necessary for an appropriate decree"

and deferred consideration of the district court's decision to appoint a trustee to sell theatres "as that merely implements the divestiture provisions which must be reconsidered by the District Court" (slip opinion, pp. 17, 18). We believe that this language is inconclusive with respect to the action taken by the district court with reference to theatres still unsold under the consent order of May 19, 1942. The facts relevant to this matter are recited at pages 6 through 12 of the appellee's brief. Briefly summarized, they are as follows: Between the filing of this suit on August 7, 1939, and May 19, 1942, when the case was called for trial, the appellants acquired sixteen theatre interests in thirteen towns (R. 257-258). In the temporary order of May 19, 1942 (R. 255-263), the appellants agreed, as a condition of securing a two-year continuance of the trial date (R. 255), within one year to "dispose of all their interests in" theatres acquired since the suit was filed (R. 257).

In July, 1943, the appellants reported the sale of six of the sixteen theatre interests and asked that they be relieved of the obligation to sell the other ten (R. 274-316). After further proceedings (R. 318-337), the district court refused to relieve the appellants of this obligation although it modified the terms on which the sales were to be made and granted the appellants a six months' extension from May 15, 1944, within which to make the sales (R. 423). The district court stated (*id*):

> It is to be impressed upon Schine that it is the present intent of the Court to see that the order aforesaid directing the sale of these theatres be enforced and that this extra time is given as a leeway, if it chooses to make the sales rather than have them made through the agency of a trustee (R. 423).

The appellants accepted these terms, set out in an order of May 31, 1944 (R. 425-426), which recited that if no acceptance were filed, a trustee to make the sales would be appointed without further notice (R. 427). Subsequently, four of the ten remaining theatre interests were sold, and the sales were approved on October 16, 1944. Since the court had previously stayed its divestiture order with respect to one theatre (R. 427), there remained five theatre interests which the appellants were required to sell but which they had not yet sold on November 16, 1945 (R. 2988-2989).

No further proceedings under the divestiture provisions of the 1942 consent order were had until after the district court decided the main litigation on October 8, 1945 (R. 3066). The final order of the district court (R. 3466) directed the divestiture of the theatre interests remaining unsold under the consent order of May 19, 1942; this direction to be carried out by a trustee within six months (R. 3467).[1]

[1] Appellee's plan of divestiture included all of the six remaining unsold interests. (R. 3290). The court omitted the Memorial Theatre at Mt. Vernon, Ohio, from its divestiture order because the appellants' objections recited that their lease had expired (R. 3285).

These facts show that the district court's decision to appoint a trustee to sell these theatres (R. 3466) was rested upon the court's construction, in May 1944 (R. 425-427), of the consent order (R. 256-263), and upon consideration of the defendants' subsequent failure to make such sales. The propriety of that decision was challenged here by the appellants upon the ground that the consent order only required appellants to offer the theatres for sale until November 15, 1944 (Main Brief, pp. 16, 168; Reply Brief, p. 25), and that they had attempted in good faith to comply with that order (Main Brief, pp. 64-65).[2]

The opinion does not appear to consider these questions. Since they do not depend upon the making of the kind of findings which the opinion states are required for a final divestiture judgment, the further proceedings ordered by this Court will not resolve these questions.

We submit that these questions should now be resolved by this Court because such action is essential to enforcement of the consent order pending the entry of a final judgment of divestiture. The appellee believes that enforcement of the consent

The Plaza Theatre at Malone, New York, was not included in Section I-E (R. 3466) of the order because Malone was included in the options specified in Section I-A (R. 3465).

[2] The appellants also point out that the 1944 order modified the provisions of the 1942 order so that higher prices than those specified in the order could be realized by Schine (Reply Brief, p. 25). This has no relevance to the argument against the decision to appoint a trustee since that trustee was empowered only to make sales subject to court approval as to price and all other terms after full opportunity for hearing appellants' objections (R. 3466-3467).

order should not await the entry of a final judgment as the further proceedings which must precede a final judgment are of uncertain duration. The appellants agreed six years ago to do what the district court was finally constrained to appoint a trustee to do. That agreement was made in consideration of a two-year continuance and its enforcement should no longer be delayed.

If this Court believes that the trial court correctly decided that a trustee for sale should be appointed to enforce the consent order, appellee should have the right to move forthwith for the entry of an order appointing a trustee for this purpose. If the Court believes that such decision was incorrect, it is important that this Court specify the error involved, as a guide to what further action the district court may take to enforce the consent order.

We respectfully request that the opinion be clarified so as to dispose of the questions raised as to the appointment of a trustee to enforce the consent order.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

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